

National Association of Regulatory Utility Commissioners

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March 5, 1996

HAND DELIVERED

Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C.

**RE: In the Matter of Interconnection Between Local
Exchange Carriers and Commercial Mobile Radio
Services - CC Docket No. 95-185**

Notice of Ex Parte Comments & Request for Waiver

Dear Sir:

Pursuant to Sections 1.41, 1.44, 1.415(d), 1.419(b), and 1.1206(a)(1) of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure,¹ the National Association of Regulatory Utility Commissioners ("NARUC") respectfully requests that the Commission grant any waivers necessary to allow NARUC to file the attached initial comments addressing the FCC's Notice of Proposed Rulemaking adopted December 15, 1995, and released January 11, 1996, [FCC 95-505], in the above-captioned proceeding one day out of time. Alternatively, NARUC requests that those Comments be deemed written **ex parte communications** within the meaning of Section 1.419(b) and 1.1206 of the Commission's regulations.

In addition, NARUC notes, in accordance with the FCC's ex parte rules, that on March 1, 1996, the undersigned faxed to the FCC's Karen Brinkmann, a copy of, inter alia, the resolution attached to these comments as Appendix A. That resolution specifically addresses the NPRM issued in this proceeding.

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¹ 47 C.F.R. Sections 1.41, 1.44, 1.415(d), 1.419(b), and 1.1206(a)(1) (1995).

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*Member of the Executive Committee of the Association

In support of this request, NARUC notes the following:

(1) NARUC has participated in a timely fashion in all earlier phases of the CMRS interconnection proceedings;

(2) Due to an unfortunate combination of events involving some copier problems late in the day, NARUC's counsel arrived at the FCC to file yesterday seconds past 5:30, literally just in time to see the secretary close the door to the filing room;

(3) The subject matter at issue in this proceeding is of undeniable and significant interest to NARUC's state commission membership;

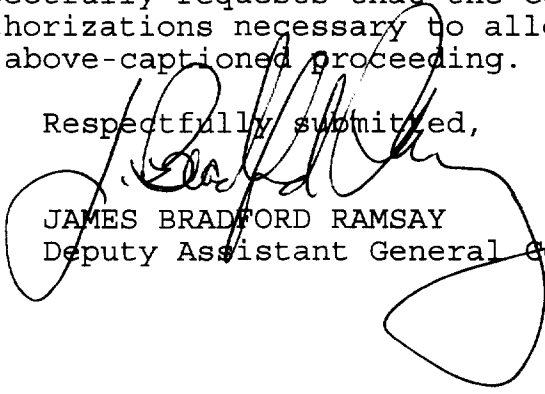
(4) No other participant's comments can adequately represent the viewpoint of NARUC's membership. This viewpoint is necessary to fully illuminate the issues raised by the FCC's proposal and assure a complete record upon which to base a decision. Hence, granting the requested waiver will serve the public interest by ensuring NARUC's full participation.

(5) No other participant will be prejudiced by allowing this late filing as -

- (a) NARUC is filing its comments on the next business day after the scheduled date;
- (b) as it was assumed NARUC would be filing yesterday, copies were sent yesterday to the FCC's copy contractor and the persons listed on the service list; [Indeed, NARUC hand delivered a copy of its comments to the Common Carrier Bureau yesterday at approximately 5:35.] Thus, the FCC employees responsible for the proceeding and all participants that rely on the FCC's copy contractor will receive copies of these comments at the same time they would have had NARUC actually filed yesterday.
- (c) NARUC's comments merely elaborate upon its resolutions which have already been lodged with the Commission.

Accordingly, NARUC respectfully requests that the Commission grant any waivers and/or authorizations necessary to allow filing comments out-of-time in the above-captioned proceeding.

Respectfully submitted,


JAMES BRADFORD RAMSAY
Deputy Assistant General Counsel

Enclosure

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Interconnection Between)	CC Docket No. 95-185
Local Exchange Carriers and)	
Commercial Mobile Radio Services)	
)	

INITIAL COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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March 4, 1996

In the Matter of)
)
)
 Interconnection Between) CC Docket No. 95-185
 Local Exchange Carriers and)
 Commercial Mobile Radio Services)
)

Pursuant to Sections 1.49, 1.415, and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. §§ 1.49, 1.415, and 1.419 (1994), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following comments addressing the FCC's "Notice of Proposed Rulemaking" ("NPRM"), adopted December 15, 1995, and released January 11, 1996, [FCC 95-505], and its February 16, 1996 released "Supplemental Notice of Proposed Rulemaking" ("SNPRM") [FCC 96-61], in the above-captioned proceeding. In the NPRM, the FCC proposes comprehensive rules governing interconnection arrangements between wireless and local exchange carriers. Following enactment of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (February 8, 1996), ("1996 Act"), the FCC issued its SNPRM seeking comment on the jurisdictional impact of the 1996 Act. NARUC respectfully urges the FCC to ensure maximum State flexibility to prescribe policies regarding interconnection with CMRS providers. In support of this position, NARUC states as follows:

I. GENERAL COMMENTS - INTEREST OF NARUC¹

NARUC is a quasi-governmental nonprofit organization founded in 1889. Its members include the governmental bodies engaged in the regulation of carriers and utilities from all fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands. NARUC's mission is to improve the quality and effectiveness of public utility regulation in America. NARUC members include State and territorial officials charged with the duty of regulating the communications common carriers operating within their respective borders. These officials have the obligation to assure that communications services and facilities required by the public convenience and necessity are established and that service is furnished at just and reasonable rates.

In this proceeding, the FCC has asked whether equal access obligations should be imposed upon commercial mobile radio service ("CMRS") providers, what rules should govern requirements for interconnection service provided by local exchange carriers ("LECs") to CMRS providers, and whether the Commission should propose rules requiring CMRS providers to interconnect with each other.

¹ In footnote 171 of the NPRM, mimeo at 60, the FCC presents a "preferred outline for comments and reply comments." NARUC only has remarks appropriate for "I. General Comments" and "II. Compensation for Interconnected Traffic between LECs and CMRS Providers' Networks B. Implementation of Compensation Arrangements 2. Jurisdictional Issues."

The FCC has proposed that interconnection rates for local switching facilities and connections to end users be priced on a "bill and keep" basis,² that flat rates apply to dedicated transmission facilities connecting CMRS and LEC networks,³ and that information about interconnection arrangements be made publicly available, Id.

As part of these inquiries, the Commission has also raised issues of when and under what conditions State regulatory oversight of interconnection can or should be preempted.

Clearly, the possible preemption or curtailment of existing State regulatory oversight of CMRS-LEC interconnection raises issues of direct concern to NARUC's State commission membership.

II. JURISDICTIONAL ISSUES

NARUC respectfully urges the FCC to ensure maximum State flexibility to prescribe policies regarding interconnection with CMRS providers.

A. Preemption is Bad Policy

An FCC preemptive approach establishing preferential interconnection policies applying only to CMRS interconnection arrangements could have the undesirable impact of favoring wireless technology. Such an approach could give CMRS providers a competitive advantage relative to new wireline local exchange competitors, which could impair the development of economically efficient telecommunications competition.

² NPRM at ¶¶ 15, 25, mimeo at 8 and 13.

³ Id. at ¶¶ 15, 19, mimeo at 8 and 10.

While NARUC supports the efficient use of technology in the provision of local exchange service, we oppose Federal policy that is not technology neutral and has the impact of favoring deployment of one technology over another.

Moreover, the FCC's proposal to establish preferential interconnection policies applying only to CMRS interconnection arrangements is counter to the policies in the 1996 Act prohibiting discriminatory interconnection arrangements.⁴ Indeed, as discussed infra, implicit in the broad role accorded the States in the new legislation is the notion that States are in the best position to monitor the interconnection arrangements that are provided, and, should local conditions warrant, impose additional obligations to inter alia, enhance competition and further universal service.

- B. Mandatory LEC - CMRS interconnection policies binding on the State commissions is counter to the State jurisdiction expressly provided in the 1996 Act.**

Generally

The 1996 Act establishes a comprehensive statutory scheme for the interconnection of telecommunications carriers, including CMRS providers, with LEC facilities.⁵

⁴ The 1996 Act requires LECs to make any interconnection agreements approved under § 252 available to any other requesting telecommunications carrier under the same terms and conditions as those provided in the agreement (See, 47 U.S.C. § 252(I)).

⁵ See, generally, 47 U.S.C. § 252, as added by the 1996 Act.

NARUC respectfully suggests that, as far as the FCC is concerned, requests for interconnection addressed to "local exchange carriers" and "incumbent local exchange carriers" are controlled by 47 U.S.C. §§ 251 and 252, as added by the 1996 Act.

If a "telecommunications carrier", defined as "any provider of telecommunications services" ⁶ seeks interconnection with a LEC, § 252, by its own terms, sets the framework for any federal action.

NARUC respectfully suggests that its clear that CMRS providers fall within the meaning of the term "telecommunications carrier." The "telecommunications service" provided by such carriers is defined by the 1995 Act as follows: "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."⁷ This definition, by its own terms, applies to CMRS carriers.

Moreover, the definition was taken from Senate Bill S. 652. The Senate Report for S. 652 states that "[t]his definition is intended to include commercial mobile services."⁸

⁶ 47 U.S.C. § 153(49), as added by § 3 of the 1996 Act.

⁷ See, 47 U.S.C. § 153(51), as added by § 3 of the 1996 Act.

⁸ S.Rep. No. 23, 104th Cong., 2nd Sess. 18 (1995); See H.R. Conf. Rpt. No. 458, 104th Cong., 2d Sess. 114-16 (1996).

Accordingly, NARUC respectfully suggests that possible FCC preemption of existing State jurisdiction over LEC-CMRS interconnection would vitiate § 252 which grants State commissions jurisdiction over any interconnection requests directed at LECs in accordance with their duties under § 251 of the 1996 Act.

Indeed, Congress specifically forbade the FCC from overriding State regulation consistent with § 251 when implementing that section.⁹

Interconnection Charges

The initial method for setting charges for interconnection under § 252 of the 1996 Act is voluntary negotiation subject to State review to assure the agreement does not discriminate against nonparties, is in the public interest, or complies with State law.¹⁰ States are given a mediation role where needed. Id. If the process breaks down, the States will arbitrate and may impose specific cost-based interconnection arrangements.¹¹

⁹ "[T]he Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that-- (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not materially prevent implementation of the requirements of this section and the purposes of this part." 47 U.S.C. § 251(d) (3) (A) - (C).

¹⁰ See, 47 U.S.C. § 252(a) (1), § 252(e) (2) as added by § 101 of the 1996 Act.

¹¹ See, 47 U.S.C. § 252(b) - (d) as added by § 101 of the 1996 Act.

In accordance with this explicit § 252 paradigm for State review of interconnection pricing and other terms, and the 1996 Act's broad express reservations of existing State interconnection authority, NARUC believes States should be allowed to determine the best methods for compensation to carriers based upon local conditions. To the extent the FCC does choose to develop policies regarding CMRS interconnection arrangements, NARUC respectfully suggests that those policies should not cause interconnecting wireline LECs to incur uncompensated costs.

C. Mandatory LEC - CMRS interconnection policies binding on the State commissions is inconsistent with the law and jurisprudence predating the 1996 Act.

In ¶ 111, mimeo at 53 -54, drafted before the 1996 Act was signed, the FCC suggests that State regulation of interconnection rates can be preempted as prohibited § 332 entry regulation. The FCC also suggests, to the extent state regulation in this area precludes reasonable interconnection, it would be inconsistent with the federal right to interconnection established by § 332 and the FCC's prior decision to preempt state regulation that prevents the physical interconnection of LEC and CMRS networks. The FCC also contends, admittedly "contrary to [its] conclusion in earlier orders" that preemption under *Louisiana Public Service Commission v. FCC*, ("Louisiana"), 476 U.S. 355, 375 n.4 (1986) may well be warranted here on the basis of inseverability.

1 - States retain authority over intrastate interconnection under the pre-existing law.

The Commission lacks authority to preempt State regulation of the rates, terms, and conditions for the intrastate portion of LEC-CMRS interconnection even under pre-existing law. As the Supreme Court held in *Louisiana*, 47 U.S.C. § 152(b) requires that when the same facilities are used for both intrastate and interstate communications, the FCC's jurisdiction extends only to the interstate portion, leaving the intrastate portion fully subject to State regulatory jurisdiction. As the New York commission correctly noted (see, ¶ 105 of the *NPRM*, mimeo at 51), and the FCC acknowledged in the *NPRM* at ¶ 111, the Commission has already recognized that cellular and related CMRS service is jurisdictionally severable. Nothing has changed since that acknowledgement of severability occurred. Moreover, the vast majority of CMRS traffic is intrastate.

As for the FCC suggestion that State regulation of LEC-CMRS interconnection may constitute § 332 prohibited "entry" regulation, NARUC respectfully notes that, when granting the FCC authority to require physical collocation in § 332(c)(B), Congress explicitly noted that "this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection..." At the time those words were enacted, all LEC-CMRS intrastate interconnection arrangements where, under the FCC's own rulings, unequivocally subject to State jurisdiction.

Moreover, even without that text, NARUC contends that proposal cannot be supported. A review of the legislative history of the Budget Act, and the tests provided for States to re-enter/continue rate regulation, clarify that Congress intended the preemptive effects of that legislation to apply only to rates charged consumer end-users of such services.

2 - The proposal to preempt State authority over LEC-CMRS interconnection policy lacks record support.

In addition, the suggestion to preempt is premature. Conspicuously absent from the record in this proceeding is a single example of State interconnection policy inhibiting either the growth or deployment of wireless facilities. Indeed, the only empirical evidence available suggests just the opposite, as an examination of the pre-1993 historical growth and expansion rates of existing wireless operators in the face of the alleged smothering state regulation will demonstrate. No case specific, or even reference to an existing or past onerous State fiat is cited. Basically the *NPRM* regurgitates what has become the standard industry boilerplate speculation bemoaning the possible impact of some hypothetical State regulation.

3 - Arguments Suggesting that Congress Wants the FCC to Comprehensively Preempt State Regulation to Assure National Uniformity are Disingenuous.

Industry comments cited in the *NPRM*, at ¶¶ 101 and 104, also revive previous arguments concerning the need to preempt to further Congresses' expectations and to avoid "balkanization" and "divergent" costs and regulations.

A simple examination of the history and the literal text of the Act completely undermine these suggestions. In amending section 332, the primary motivation evinced was to assure regulatory parity among similarly situated operators under the FCC's, NOT the States', regulations. Indeed, the revised Section 332 gives the States specific authority to impose "divergent" costs and requirements on CMRS operators via "other terms and conditions."

Accordingly, both the 1996 Act and the pre-existing law indicate that FCC preemption of State regulation of CMRS-LEC interconnection is not appropriate.

III. CONCLUSION

NARUC respectfully requests that the Commission carefully examine and give effect to these comments.

Respectfully submitted,


PAUL RODGERS
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CHARLES D. GRAY
Assistant General Counsel


JAMES BRADFORD RAMSAY
Deputy Assistant General Counsel

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March 4, 1996

**Appendix A - Resolution Advocating Federal/State Partnership on
CMRS Interconnection and Opposing Federal
Preemption**

WHEREAS, The Federal Communications Commission (FCC) has issued a Notice of Proposed Rulemaking in CC Docket No. 95-185 and CC Docket No. 94-54 concerning interconnection between local exchange carriers and commercial mobile radio service (CMRS) providers; and

WHEREAS, The FCC has proposed that interconnection between local exchange carriers and CMRS providers be priced on a "bill and keep" basis (i.e., carriers reciprocally terminate calls through a mutual exchange of traffic at no charge); and

WHEREAS, The FCC has also proposed that dedicated transmission facilities connecting local exchange carrier and CMRS networks be priced based on existing access charges for similar transmission facilities; and

WHEREAS, The FCC has asked for comments on whether it should adopt an interconnection model that is not binding on State regulatory commissions, a mandatory preemptive model with broad parameters, or specific preemptive requirements; and

WHEREAS, The "Telecommunications Act of 1996" (this Act) requires that incumbent local exchange carriers provide interconnection on rates, terms, and conditions that are just, reasonable, and nondiscriminatory (Section 251(c)(2)(D)); and

WHEREAS, This Act requires that interconnection arrangements provided by incumbent local exchange carriers through negotiated or arbitrated agreements or offered by Bell operating companies through generally available terms and conditions be submitted to the State commission for approval (Section 252(e) and (f)); and

WHEREAS, This Act requires that a local exchange carrier make any interconnection agreements approved under Section 252 available to any other requesting telecommunications carrier under the same terms and conditions as those provided in the agreement (Section 252(I)); and

WHEREAS, The FCC's proposal to establish preferential interconnection policies applying only to CMRS interconnection arrangements is counter to the policies in this Act prohibiting discriminatory interconnection arrangements; and

WHEREAS, The FCC's proposal to establish preferential interconnection policies applying only to CMRS interconnection arrangements could give CMRS providers a competitive advantage relative to new wireline local exchange competitors, which could impair the development of economically efficient telecommunications competition; and

WHEREAS, CMRS service is jurisdictionally separable, with the vast majority of CMRS traffic being intrastate; and

WHEREAS, The States retain jurisdiction over intrastate interconnection rates, and terms and conditions of intrastate CMRS service under Section 332 of the Telecommunications Act of 1996, and

WHEREAS, Adoption by the FCC of CMRS interconnection policies binding on the State commissions would be counter to the State jurisdiction expressly provided in this Act; and

WHEREAS, Based upon particular local circumstances states should be allowed to determine the best method of mutual compensation for interconnection and transport; now, therefore, be it

RESOLVED, That the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), convened at its 1996 Winter Meeting in Washington, D.C., urges the FCC to ensure the establishment of policies regarding CMRS interconnection arrangements that will not unfairly advantage wireless providers over other potential local exchange competitors; and be it further

RESOLVED, That the NARUC urges the FCC to ensure maximum State flexibility to prescribe policies regarding interconnection with CMRS providers; and be it further

RESOLVED, That the NARUC urges the FCC to develop policies regarding CMRS interconnection arrangements that would not cause interconnecting wireline local exchange carriers to incur uncompensated costs; and be it further

RESOLVED, That the NARUC General Counsel file comments with the FCC conveying these NARUC positions.

Sponsored by the Committee on Communications
Adopted February 28, 1996

CERTIFICATE OF SERVICE

I, JAMES BRADFORD RAMSAY, certify that a copy of the foregoing was sent by first class United States mail, postage prepaid, to all parties on the attached Service List.

James Bradford Ramsay
Deputy Assistant General Counsel

National Association of
Regulatory Utility Commissioners

March 4, 1996

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